

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Union Pacific Railroad Company, the City of Rochelle, and the State of Illinois, Department of Transportation. : T01-0022 2nd Supp.

Stipulated Agreement regarding improving public safety at the crossings of the Company's tracks with public highways known as Main Street, Washington Street, 9th Street, 1st Avenue, and Caron Road, located in the City of Rochelle, Ogle County, Illinois, designated as crossings AAR/DOT 175 199F, milepost 74.80 CNWA, AAR/DOT 175 120A, milepost 74.86 CNWA, AAR/DOT 175 122N, milepost 75.11 CNWA, AAR/DOT 175 123V, milepost 75.42 CNWA, and AAR/DOT 176 394E, milepost 74.23 CNWA, respectively.

SECOND SUPPLEMENTAL ORDER

By the Commission:

PROCEDURAL HISTORY

On April 11, 2001, the Illinois Commerce Commission ("Commission") entered its original Order in this matter that required, among other things, the Union Pacific Railroad Company ("UP" or "Union Pacific"), to install automatic flashing light signals and gates controlled by constant warning time circuitry at its crossings with Washington Street, 9th Street, 1st Avenue, and Caron Road, and the installation of constant warning time circuitry, new gate arms, and new concrete crossing surfaces at the Main Street crossing, all located in the City of Rochelle, Ogle County. The Order authorized and adopted the terms of a Revised Stipulated Agreement executed by the Staff of the Commission ("Staff"), the City of Rochelle, the Illinois Department of Transportation ("IDOT") and Union Pacific. The work was to be completed within eighteen (18) months from the date of the original Order.

On October 18, 2002, the Union Pacific filed a Supplemental Petition with the Commission requesting an extension of time to and including December 31, 2002, within which to complete the work as required by the original Order. By Supplemental Order entered November 20, 2002, the Commission granted the request for an extension of time to complete the work by December 31, 2002.

On July 16, 2008, the Union Pacific filed a Petition for an Amended Order with the Commission requesting that the Union Pacific be reimbursed by IDOT and/or the Grade Crossing Protection Fund ("GCPF") the additional total amount of \$148,964, which it contends constitutes the total cost overruns for labor and material incurred by Union Pacific to fulfill the Commission's original Order in this matter.

Pursuant to notice given in accordance with Law and the rules and regulations of the Commission, the matter came on for hearing before a duly authorized Administrative Law Judge ("ALJ") of the Commission at the Commission's Chicago office on October 2, 2008. Petitioner Union Pacific was represented by counsel. An appearance by counsel was also entered on behalf of IDOT, and by Brian Vercruysse, Senior Railroad Safety Specialist, representing the Commission's Transportation Bureau, Railroad Section ("Staff"). Samuel Tesreau appeared on behalf of the City of Rochelle ("City" or "Rochelle"). At the conclusion of the October 2, 2008 hearing, the record was marked "Heard and Taken."

PETITIONER'S EVIDENCE

In its Petition, UP submits that the Commission's original Order entered in this matter on April 11, 2001, concerned safety improvements at an at-grade crossing corridor consisting of five (5) at-grade crossings (the "Project") in the City of Rochelle, Illinois, performed pursuant to the Revised Stipulated Agreement ("Agreement"). The Agreement provided that the preliminary estimates of cost to install the constant warning time circuitry and new gates at all of the crossings for the entire Project totaled \$1,222,016. This cost was allocated and capped at \$285,000 from IDOT, utilizing federal funds, with the remaining estimated cost for the Project to be borne ninety percent (90%) by the GCPF and ten percent (10%) by Union Pacific. The GCPF cost was capped at \$843,314. In addition, UP was ordered to bear one hundred percent (100%) of the cost of installing the crossing surfaces at Main Street, and all future maintenance of all crossing surfaces and signals that made up the Project.

In accordance with the Order, UP submitted to the Commission Project estimates detailed in Work Orders 32673, 32674, 32675, 32676, and 32677, totaling \$1,222,016. The final actual overall collective cost of the project, however, was \$1,403,549.80. UP contends that this corridor Project required work in areas encumbered with existing utility installations under the roadways. Working around these utility installations required the UP's gangs to saw cut the roadway instead of boring, which was more labor intensive and adversely impacted estimated labor costs. In addition, part of the work was necessarily performed in the winter months under frozen ground conditions that also adversely impacted estimated labor costs. The crossings had to be DAX'ed, connected together, which consisted of digging from one end of the corridor to the other. In addition, UP states that circuit changes were required to accommodate interconnection with the Rochelle Intermodal Facility. It was necessary from time to time for the UP signal gangs to work overtime to complete the Project on schedule.

Work Order 32673 authorized the installation of flashing light signals at Main Street, MP 74.80. This Work Order overran its authority in labor by \$9,592 because of the duration of the work and the addition of required materials necessary to complete the Work Order. The Work Order authorized 1,128 hours for 28.2 days. However, the actual labor ended up being 1,379 hours, including 104 hours of overtime, for 36 days. The material for this Work Order overran by \$30,954. The Work Order was estimated on September 22, 2000 and approved on May 22, 2001, with final signal design being completed on June 21, 2001. The estimate was submitted for final approval prior to

signal design completion. The material overrun was caused by the adjustment of materials to the Work Order and purchases from Harmon Rail and Industries to meet the final signal design requirements. The total cost for Work Order 32673 came to \$243,262.97. UP claims that the 90% portion to be paid to UP is \$218,936.67, of which \$169,709 has already been paid to UP. Union Pacific requests that it be paid the balance of \$49,227.67 for Work Order 322673.

There was no cost overrun for Work Order 32674.

Work Order 32675 authorized installation of a crossing warning system and a remote GCP at 9th Street, MP 75.11 and MP 75.22. This Work Order overran its authority in labor and material by \$83,482. UP contends that the labor overrun of \$26,169 was caused by the additional work required to install the additional material required for the Work Order that extended the work time. The Work Order estimate authorized 1,488 hours for 37.2 days. However, the actual labor ended up being 2,198 hours, including 285 hours of overtime, for 51 days. The additional material required for the extra work overran the original estimate by \$57,312. The estimate was written on September 22, 2000 and approved on May 21, 2001, with final signal design being completed on June 28, 2001. This Work Order was approved using the initial estimate prior to final signal design being completed. The final Work Order required material upgrades to support the final design. The total cost for Work Order 32675 is \$387,150.67, 90% of which is \$348,435.68. To date UP has been paid \$310,073.18. UP requests that it be paid the balance of \$38,362.50 for Work Order 32675.

Work Order 32676 authorized the installation of a crossing warning system and a remote GCP at 1st Street, MP 75.42. The Work Order overran its authority in material by \$3,195. However, labor cost came in below the estimate. The estimate was written on September 22, 2000 and approved on May 21, 2001, with final signal design being completed on June 28, 2001. The cause of the material overrun is the same as the previous Work Orders. Work Order 32676 was approved using the initial estimate prior to final signal design being completed. The final Work Order required material upgrades to support the final design. The total cost for Work Order 32676 is \$275,295.94, 90% of which is \$247,766.35. To date UP has been paid \$246,421.25. UP requests that it be paid the balance of \$1,345.10 for Work Order 32676.

With respect to Work Order 32677, UP contends, for purposes of accounting efficiency and in accordance with the Commission's original Order, the billing and accounting for that portion of the Project covered by this Work Order was first processed to utilize 100% of IDOT's funding of \$285,000 for the entire Project. The total cost for Work Order 32677 was initially determined to be \$359,009.76. However, it was subsequently determined by UP that a small quantity of material in the amount of \$16,018.54 was incorrectly charged to Work Order 32677. Therefore, the initial total cost of \$359,009.76 was reduced by \$16,018.54, for a corrected total cost for Work Order 32677 of \$342,991.22. To date UP has billed IDOT for UP's labor and material costs for Work Order 32677. According to UP, IDOT payments for these bills to date are \$277,163.18. UP has issued a final bill in the amount of \$7,836.82 to IDOT for the balance of the \$285,000.00 to be paid by IDOT for the entire Project. UP claims that the balance of the adjusted total cost for Work Order 32677 owed to UP is \$65,828.04

(\$342,991.22 - \$277,163.18 = \$65,828.04). UP further contends, however, that payment for this \$65,828.04 is to be split. IDOT owes the first \$7,836.82 to reach its commitment of \$285,000.00 per the original Order. Second, the GCPF potentially owes 90% of the remaining \$57,991.22 (\$65,828.04 - \$7,836.82) or \$52,192.10. UP therefore requests that IDOT be ordered to pay UP \$7,836.82 and that UP be paid an additional \$52,192.10 from the GCPF for a total of \$60,028.92.

Work Order 32677 authorized installation of a warning system at Caron Road, MP 74.23, which overran its authority in labor and materials by \$74,384. The Work Order Estimate provided for 1,678.4 hours for 41.96 days for the UP signal gangs to complete this portion of the Project. However, the actual labor ended up being 2,975.5 hours, including 222 hours of overtime, for 80 days that created a labor overrun of \$49,199. The additional labor was required to meet the final design requirements. The cost for the material overran the estimate by \$25,185 (less the \$16,018.54 that was incorrectly charged). This Work Order was approved using the initial estimate prior to final signal design being completed.

In sum, UP contends that it is owed \$49,227.67 for Work Order 32673, \$0.00 for Work Order 32674, \$38,362.50 for Work Order 32675, \$1,345.10 for Work Order 32676, and \$60,028.92 for Work Order 32677 for a total of \$148,964.19. UP seeks to be reimbursed the additional \$148,964.19 from IDOT and/or the GCPF for the subject corridor Project. UP does not seek additional funds from the City of Rochelle.

In addition to its request to be reimbursed the additional \$148,964.19, UP requests that the Commission issue a ruling indicating that the federal funds that have already been used for the Project were allocated to all five of the grade crossing systems of the Project. UP points out that, because of the accounting method adopted by UP and IDOT which utilized 100% of the IDOT portion of funding on a single Work Order for the installation of a warning system at Caron Road, it may appear that the federal funding was allocated to one of the grade crossing projects, not to all five. UP claims that this accounting method may interfere with UP gaining federal preemption status for all five crossings because federal preemption status on each crossing requires that federal funds be spent on each element of the entire Project. Federal preemption at each crossing affords UP protection from personal injury and property damage claims at grade crossings.

STAFF'S POSITION

Staff objects to granting Petitioner's request to be reimbursed additional funds from IDOT and/or the GCPF. Staff points out that the original Stipulated Agreement indicated that participation from the GCPF was an amount not to exceed \$843,314, which has been contributed to the Project per the bills that were submitted by the Union Pacific Railroad Company. Union Pacific filed a Supplemental Petition with the Commission on October 18, 2002, requesting an extension of time to and including December 31, 2002 to complete the Project. Staff stated that in the Supplemental Petition, UP noted that the delay in completing the Project was created by material and supply issues as well as a destroyed signal at another crossing at Demment Road. Staff contends that UP should have raised the issue of additional costs for greater labor

charges or any issues associated with winter conditions when it filed the Supplemental Petition in 2002.

Staff further states that there is a six-year lapse in time since UP filed its last Supplemental Petition. According to Staff, the time lapse makes it difficult to recreate exactly what scope of work was added or what additional material costs were needed for the Project. More importantly, however, is the fact that the GCPF currently is running at a deficit and Staff is therefore not able to recommend that additional Grade Crossing Protection Funds be utilized for this Project. The Commission does not have the additional amount requested here included in its crossing surface improvement program.

With respect to the federal preemption issue, Staff notes that section 5a of the Stipulated Agreement specifies that "the cost to install the constant warning sign circuitry and new gates at the Main Street crossing, Washington Street, 9th Street, 1st Avenue, and Caron Road, estimated to be \$1,222,016, should be allocated the sum of \$285,000, from the Department utilizing federal funds." Staff is of the opinion that this statement shows that it is understood that the federal funds would be allocated to the overall Project consisting of all five crossings. Furthermore, Staff points out that the Commission's original Order entered April 11, 2001, indicates in the fourth ordering paragraph that "It is Further Ordered that since federal funding is being utilized for the warning device improvements at the subject crossings, all such work shall be covered by appropriate provisions of Title 23, Chapter 1, Subchapter G, Part 646 of the Federal-Aid Policy Guide Adopted December 9, 1991."

IDOT'S POSITION

IDOT concurs with Staff and states UP implies that IDOT owes the Railroad \$7,836.82 for cost overruns related to Work Order 32677. IDOT asserts that all amounts due for this Project have been paid. The amounts are substantiated by invoices admitted into evidence, which have been approved and paid and total \$285,000. IDOT agrees with Staff that too much time has passed to recreate the scope of work that caused the cost overruns. IDOT is not willing to consider reimbursement to UP for the cost overruns identified in the Petition for Amended Order.

COMMISSION ANALYSIS AND CONCLUSIONS

The Commission is of the opinion that it is unable to grant Union Pacific Railroad Company's Petition requesting additional funds in the amount of \$148,964.19 for the completion of the improvements at the company's crossings with Washington Street, 9th Street, 1st Avenue, Caron Road, and Main Street, in the City of Rochelle, Ogle County. The Commission agrees with the position of Staff and IDOT that six years is too great a lapse in time to validate the justifications given by UP for the cost overruns incurred by UP on the Project. Union Pacific's request for reimbursement of the cost overruns should be denied for reason that its request was not timely filed.

With respect to the federal preemption issue raised by UP, the Commission's original Order in this matter entered April 11, 2001, clearly states that, "since federal funding is being utilized for the warning device improvement at the subject crossings, all such work shall be covered by appropriate provisions of Title 23, Chapter 1, Subchapter G, Part 646 of the Federal-Aid Policy Guide adopted December 9, 1991." The Commission authorized funding not to exceed the amount of \$843,314 from the GCPF and \$285,000 in federal funds from IDOT for improvements at five crossings in this docket: Washington Street, 9th Street, 1st Avenue, Caron Road, and Main Street. Thus, it is the Commission's opinion that the federal funds allocated to the Project apply to all five crossings regardless of the accounting methodology used by UP for billing purposes.

PROPOSED ORDER

A Proposed Second Supplemental Order denying the Petition was filed on or about February 19, 2009, and was served upon all Parties on record. Staff filed a Brief on Exceptions indicating that it had no exceptions to the Proposed Second Supplemental Order. No other Briefs were filed. Union Pacific Railroad Company did not file a Brief on Exception, nor did it contest the Proposed Second Supplemental Order in any other manner.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having given due consideration to the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- 1) the Commission has jurisdiction of the Parties hereto and the subject matter of this proceeding;
- 2) the recitals of fact, as set forth in the prefatory portion of this Second Supplemental Order, are true and correct and are hereby adopted as findings of fact;
- 3) the Petition filed by the Union Pacific Railroad Company seeking reimbursement of \$148,964 in cost overruns on the Project from IDOT and/or the Grade Crossing Protection Fund is denied;
- 4) the federal funds that have been paid to Union Pacific Railroad Company apply to all five crossings improved under the overall Project.

IT IS THEREFORE ORDERED that the Petition for an Amended Order filed by the Union Pacific Railroad Company seeking reimbursement for cost overruns from IDOT and/or the Grade Crossing Protection Fund in the amount of \$148,964.19 is denied.

IT IS FURTHER ORDERED that the federal funds allocated to the Project apply to all five crossings that were included in the Project approved by the Commission's original Order entered April 11, 2001 herein.

IT IS FURTHER ORDERED that subject to Sections 18c-2201 and 18c-2206 of the Law, this is a final Order of the Commission subject to Administrative Review Law.

By Order of the Commission this 25th day of March 2009.

A handwritten signature in black ink, reading "Charles E. Box" with a subscript "2" under the final "x". The signature is written in a cursive, flowing style.

CHARLES E. BOX
CHAIRMAN